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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 39136
)	
v.)	
)	
ROBERT JOSEPH FRAUENBERGER,)	REPLY BRIEF
)	
Defendant-Appellant.)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CUSTER

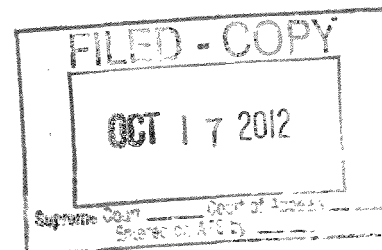
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STATEMENT OF THE CASE

Nature of the Case

Robert Joseph Frauenberger appeals from the district court's judgment of conviction. A jury convicted Mr. Frauenberger of three counts of lewd conduct and one count of delivery of marijuana to a person under the age of eighteen. The Third Amended Criminal Information listed Bonnie Noe as the alleged minor victim involved in each count. However, no evidence at trial was presented concerning the alleged victim, thirteen year-old "Bonnie Noe." On appeal, Mr. Frauenberger asserts that the evidence presented at trial was insufficient to support the convictions because the State failed to provide substantial competent evidence to find, beyond a reasonable doubt, that Mr. Frauenberger engaged in inappropriate sexual contact with "Bonnie Noe" or provided her with marijuana.

Alternatively, Mr. Frauenberger asserts that the district court did not have jurisdiction to allow the jury to make findings on crimes related to B.H. as he had never been charged with said crimes. At trial, evidence was presented which showed that Mr. Frauenberger may have committed crimes, similar to those charged, involving another minor, B.H. Although the information charged Mr. Frauenberger with committing these crimes against "Bonnie Noe," the jury was instructed that it must find Mr. Frauenberger guilty if they believed he committed these crimes against B.H. Because Mr. Frauenberger had never been charged with committing lewd conduct against B.H. or providing marijuana to B.H., he asserts that the district court did not have jurisdiction to allow the jury to make a finding on Mr. Frauenberger's guilt as to those charges which had never been filed.

Alternatively, Mr. Frauenberger asserts that the district court created an impermissible variance when it failed to limit the elements instruction for each of the charges to those overt acts alleged in the Information, specifically that the alleged victim was Bonnie Noe, not B.H. as the jury was instructed.

Additionally, Mr. Frauenberger asserts that the State committed prosecutorial misconduct which deprived him of a fair trial. The prosecution violated its duty to see that Mr. Frauenberger had a fair trial by engaging in vouching, presenting improper evidence, and appealing to the passions and prejudices of the jury. Mr. Frauenberger contends that the misconduct committed in his case was either preserved by objection or constituted fundamental error and that the errors are not harmless. Moreover, Mr. Frauenberger asserts the district court abused its discretion in failing to grant his motion for a mistrial based upon prosecutorial misconduct.

Further, Mr. Frauenberger contends the district court abused its discretion when it sentenced him to an excessive sentence without considering the mitigating factors that exist in his case.

This Reply Brief is necessary to address the State's assertions that there was sufficient evidence to support Mr. Frauenberger's convictions, that the district court had jurisdiction over charges involving B.H., and that the variance in the case at hand is not fatal.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Frauenberger's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Was the evidence presented at trial insufficient to support the jury's verdicts finding Mr. Frauenberger guilty of lewd conduct or delivery of marijuana to Bonnie Noe?
2. Were the charges for which Mr. Frauenberger was ultimately convicted, related to criminal conduct involving a minor victim B.H., charges for which no information or indictment had been filed and for which subject matter jurisdiction had not been conferred?
3. Did the district court create a fatal variance from the State's information when it instructed the jury that the charges involved the minor victim B.H. instead of Bonnie Noe as alleged in the information?
4. Did the State violate Mr. Frauenberger's right to a fair trial by committing prosecutorial misconduct?
5. Did the district court abuse its discretion when it imposed, upon Mr. Frauenberger, unified sentences of ten years, with two years fixed, for the lewd conduct charges, and four years, with one year fixed, for the delivery of marijuana charge, to be served concurrently?

ARGUMENT

I.

The Evidence Presented At Trial Was Insufficient To Support The Jury's Verdicts Finding Mr. Frauenberger Guilty Of Lewd Conduct Or Delivery Of Marijuana To Bonnie Noe

Mr. Frauenberger asserts that the evidence presented at trial was insufficient to support his convictions for three counts of lewd conduct and one count of delivery of marijuana to a person under the age of eighteen because the State failed to provide substantial competent evidence to find, beyond a reasonable doubt, that Mr. Frauenberger engaged in inappropriate sexual contact with Bonnie Noe or provided her with marijuana as he was charged.

The State has asserted that whether there was sufficient evidence “to establish beyond a reasonable doubt that B.H. and “Bonnie Noe” were the same person is irrelevant to a sufficiency of the evidence analysis . . . because the name of the victim is not an element of any of the charged crimes. (Respondent's Brief, pp.13-14.) And, that “[n]either the lewd conduct statute nor the marijuana delivery statute require as an essential element proof of the victim’s name.” (Respondent's Brief, p.14.)

However, “[a] criminal defendant is entitled to be apprised by the charging instrument not only of the name of the offense charged but in general terms of the manner in which it is alleged to have been committed.” *State v. Brazil*, 136 Idaho 327, 331 (Ct. App. 2001) (citing I.C. §§ 19-1303, -1409 (charging instrument must contain a statement of the acts constituting the offense); I.C. § 19-1411 (charging instrument must be direct and certain as it regards the particular circumstances of the offense charged); *State v. McMahan*, 57 Idaho 240, 246-47 (1937) (holding that an information must not

only state the name of the alleged crime but also inform the accused as to how it is claimed the accused committed the offense.)). If a charging instrument must contain information which provides for particularity in the way an offence was committed, the name of the alleged victim should be considered such vital information. In fact, *Thurlow* holds that an information should reflect the name of the prosecutrix as such data is an essential part of the charge against a defendant for lewd and lascivious conduct. *State v. Thurlow*, 85 Idaho 96, 103 (1962). While the formal name of an individual may not control and guide a sufficiently of the evidence review, the identity of the person alleged as a victim must.

Mr. Frauenberger asserts that, in the case at hand, the name Bonnie Noe was presented in the charging document, providing the factual basis for his alleged criminal activity as is required to confer jurisdiction. See Issue II. Because the identity of the alleged victim is an essential part of the charge, as held in *Thurlow*, and because the State asserted specific factual data in the Information, the State was required to present substantial competent evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt, including the identity of the alleged victim, Bonnie Noe. There was no evidence, much less substantial and competent evidence, presented that proved, beyond a reasonable doubt, that B.H. was Bonnie Noe or that Mr. Frauenberger had any sexual contact or provided marijuana to Bonnie Noe. When the discrepancy between the charging instrument allegations and the proof at trial is that of an entirely different person, that discrepancy is not merely a variance, it is failure of proof. Because the State did not prove that B.H. was Bonnie Noe or that Mr. Frauenberger

had committed any offense against Bonnie Noe, proof of which was essential in order to establish the State's charges beyond a reasonable doubt, there was no evidence that would support a finding of guilt on any of the charges and the convictions must be overturned.

II.

The Charges For Which Mr. Frauenberger Was Ultimately Convicted, Related To Criminal Conduct Involving A Minor Victim B.H., Were Charges For Which No Information Or Indictment Had Been Filed And For Which Subject Matter Jurisdiction Had Not Been Conferred

The State asserted that, "Frauenberger's argument is without merit because it conflates the concepts of lack of jurisdiction, which may be raised for the first time on appeal, and lack of notice, any claim of which is waived if not raised as an issue before trial." (Respondent's Brief, p.9.) However, Mr. Frauenberger has explicitly not raised a notice issue.¹ Instead, the State has attempted to reclassify the issue raised on appeal to an issue that could be decided in the State's favor as opposed to fully addressing the merits of the issue actually raised on appeal.

Mr. Frauenberger was charged with three counts of lewd conduct and one count of delivery of marijuana to a minor, all charges specifically noting that Bonnie Noe was the alleged victim. Although the information charged Mr. Frauenberger with committing these crimes against Bonnie Noe, the jury was instructed that it must find Mr. Frauenberger guilty if they believed he had committed these crimes against B.H.

¹ Mr. Frauenberger does not raise a notice issue in this appeal. He concedes that a notice claim should have been raised prior to trial and is now waived. However, he maintains that a failure to raise a notice claim does not preclude review of any of the issues specifically addressed on appeal, as these issues are either preserved or amount to fundamental error.

The district court did not have jurisdiction to allow the jury to make a finding on Mr. Frauenberger's guilt as to charges that had never been filed. Mr. Frauenberger asserts that he had never been charged for crimes associated with an alleged victim named B.H. Therefore, there was no jurisdiction for the district court to instruct the jury on crimes related to B.H.

As stated in the Appellant's Brief, Mr. Frauenberger does not challenge that the information is defective. He acknowledges that the information properly charged him with crimes related to the alleged victim Bonnie Noe. On appeal, the State asserts that "[t]here is no jurisdictional requirement that the charging document also use the victim's actual name." (Respondent's Brief, p.10.) In coming to this conclusion, the State acknowledged the seminal cases in Idaho related to jurisdiction: *State v. Jones*, 140 Idaho 755 (2004) and *State v. Quintero*, 141 Idaho 619 (2005). Although *Jones* and *Quintero* do not stand for the proposition that an alleged victim must be named, other authority suggests that a victim must be named in order for information to be legally sufficient. See *State v. Lenz*, 103 Idaho 632, 633-34 (Ct. App. 1982) and I.C. § 19-1409. The State erroneously asserted that the above authority is only relevant to a due process notice claim, an unsupported limitation. Additionally, the State, tellingly, failed to address *State v. Thurlow*, 85 Idaho 96, 103 (1962) (finding that an information should reflect the name of the prosecutrix as such data is an essential part of the charge against a defendant for lewd and lascivious conduct). Mr. Frauenberger asserts that the above authority requires that the State name an alleged victim in the information and prove that the named victim and the injured person, as presented at trial, can be

identified as one in the same, regardless of the actual name used.² In this case, the State chose to name Bonnie Noe as the alleged victim and, as such, the information only conferred jurisdiction for the district court to instruct on crimes related to Bonnie Noe or a person with the same identity.

Alternatively, as asserted by the State, even if an alleged victim does not have to be named, if the State chooses to name an alleged victim, they may limit what otherwise might be very broad jurisdiction to jurisdiction only over conduct involving the named individual. Although admittedly not binding on this issue, Mr. Frauenberger asserts that cases holding that the offense charged is controlled by the facts alleged in an information are persuasive to show that specified factual information limits authority. *See State v. Mickey*, 27 Idaho 626 (1915) (holding that involuntary manslaughter was charged in the information although the information designated the offense as manslaughter because the specific facts stated in the information alleged all the facts constituting involuntary manslaughter); *State v. McKeehan*, 91 Idaho 808 (1967) (holding that where the caption of the complaint and information charged aggravated assault, but the charging language “clearly indicated an aggravated battery” the amendment of the information was proper because it was “merely to correct the caption to properly designate the offense unmistakably charged in the charging part of the information.”); and *State v. O’Neill*, 118 Idaho 244 (1990) (holding the “facts alleged rather than the designation of the offense” controls. As such, it was not necessary to

² Mr. Frauenberger asserts that the use of a minor, alleged victim’s true initials is sufficient to provide the “name” of the alleged victim in order to confer jurisdiction; however, the use of a pseudonym is likely insufficient, especially where information is not provided stating clearly that such name is a pseudonym.

have provided O'Neill with a new preliminary hearing because the acts alleged in the Amended Information were the same acts charged in the original Information and those facts controlled which crime was actually charged.). Because the facts alleged control which offense is actually charged, regardless of the designation of the offense charged, the facts also necessarily provide a limit as to the specific offense or specific criminal activities for which a defendant can be tried.

In this case, there is not an information charging Mr. Frauenberger with any criminal actions involving B.H., nor specific facts alleged to show that he was charged with criminal actions involving B.H. as apposed to the named alleged victim, Bonnie Noe. Therefore, the information filed conferred jurisdiction only for the crimes charged involving Bonnie Noe. Because there was no jurisdiction for the district court to allow the jury to make a determination as to Mr. Frauenberger's potential guilt associated with his possible actions involving B.H., he asserts that his convictions must be vacated.

III.

The District Court Created A Fatal Variance From The State's Information When It Instructed The Jury That The Charges Involved The Minor Victim B.H., Instead Of Bonnie Noe As Alleged In The Information

The State has asserted that the variance in this case is not fatal and does not rise to the level of fundamental error. (Respondent's Brief, pp.15-25.) However, Mr. Frauenberger asserts that the variance is fatal because it leaves him open to the risk of being prosecuted for suspected crimes involving B.H. Mr. Frauenberger does not assert that the variance in his case implicates concerns of fair notice, but only that it has double jeopardy implications.

In the case at hand, Mr. Frauenberger was charged with crimes associated with the named victim Bonnie Noe; however, the evidence presented at trial was that he may have engaged in criminal activities involving B.H. and the jury was instructed using the name B.H. instead of the charged name Bonnie Noe. (R., pp.18-21, 80-105; Augmentation, Jury Instruction Number 10.) The State has asserted that this mere variance is not of constitutional significance because Bonnie Noe is just an obvious pseudonym. (Respondent's Brief, pp.17-23.) In support of this argument, it relies heavily on a line of cases originating out of Texas. (See Respondent's Brief, pp.17-20 (citing *Stevens v. State*, 891 SW.2d 649, 650-51 (Tex. Crim. App. 1995) *Washington v. State*, 59 S.W.3d 260, 263-64 (Tex. Ct. App. 2001)). However, it is important to note that these cases have limited relevance due to Texas' enactment of a specific article of their criminal code dealing with a victim's right to chose a pseudonym and how such pseudonym is to be used in criminal case, including the filing of a pseudonym form which must be turned into law enforcement and provides for disclosure of the name to the defense or use at trial if identity is an issue. Tex.Code Crim.Proc.Ann. art. 57.02.

The State also relies on *Monfort v. State*, 635 S.E.2d 336, 337-38 (Ga. Ct. App. 2006). The section specifically quoted by the State is actually taken from a quote in the *Monfort* opinion citing to *Harrison v. State*, 385 S.E.2d 774 (Ga. Ct. App. 1989). Interestingly, *Harrison* dealt with a fatal variance between the indictment and the proof in that the indictment alleged a robbery of Phil Stephenson, the owner of the service station where a robbery occurred, whereas the evidence established that the victim had been Randy Hicks, an employee of the service station. *Id.* The Georgia Court of Appeals specifically found that:

In cases such as the present one, where a variance exists between the victim's name as alleged in the indictment and as proven at trial, it has generally been held that the variance is not fatal if the two names in fact refer to the same individual, such as where a mere misnomer is involved or where the variance is attributable to the use of a nickname or alias by the victim. . . .

It is apparent without dispute from the evidence in the present case that the person identified as the victim in the indictment was not in fact the person against whom the robbery was committed, and the state has suggested no reason why this error could not have been corrected prior to trial. Being aware of no decision from any state or federal appellate court in the nation upholding a conviction of a crime of personal violence under such circumstances, we hold that the variance was fatal and that the trial court consequently erred in denying the appellant's motion for new trial.

Id. at 775-76.

The case at hand is not one involving a statutorily allowed victim's choice of pseudonym, a nickname, an alias, or a mere misnomer and, therefore, the cases cited by the State provide little insight into the issue presented on appeal.

Mr. Frauenberger concedes that not all variances regarding the name on the charging document and the evidence at trial are fatal. Some variances, such as those involving a nickname, alias, or obvious pseudonym, may present no constitutional problem if the defendant is provided notice and the jury is able to determine that the individuals are the same person regardless of how the State named the alleged victim. However, that is not what occurred in the case at hand.

The State's assertion that Bonnie Noe was a pseudonym for B.H., is not bore out by the record. In this case, the State did not present any evidence that Bonnie Noe and B.H. were the same individual. (*See generally* Tr. Trial.) The name Bonnie Noe shares no obvious similarities to B.H.'s actual name. And, Bonnie Noe is not a recognized pseudonym like John or Jane Doe.

While some variances make no difference at all, some make all the difference in the world. Suppose, for example, the information alleged that the defendant killed Robert Smith. At the trial, the State proves that the defendant killed Julie Hart. That is a huge mistake. Murder maybe murder, but killing one person is not the same offense as killing an entirely different person. See *The Hoppet v. United States*, 11 U.S. 389, 394 (1812) (Marshall, C.J.) ("The rule that a man shall not be charged with one crime and convicted of another may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved and state such a crime as will justify the judgment to be pronounced."); see also *Dunn v. United States*, 442 U.S. 100, 105 (1979) ("A variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment"). A variance of this type is actually a failure of proof because the charging document alleges one distinct offense, but the proof shows an entirely different offense. See Issue I.

As eloquently noted recently by the Texas Court of Appeals in ultimately reversing and entering a judgment of acquittal in a theft case involving an improperly named victim of theft:

But is the State correct? "What's in a name? That which we call a rose/By any other name would smell as sweet." No matter what we call it, this flower is still a rose. But a rose does not smell like a pickle. Are roses and pickles interchangeable? Is the evidence legally sufficient under [federal and Texas law] if everyone knew that it was really Wal-Mart who owned the stolen property, so it just did not matter who was alleged as the owner in the information and jury charge? The information could have alleged "Simon Legree," "Carnac the Magnificent," or "Macy's" for all we care, because it was undisputed at trial that Wal-Mart owned the property. No.

The parties, the court, and the jury must know the identity of the owner, regardless of how the State names him.

Byrd v. State, 336 S.W.3d 242, 253-54 (Tex. Crim. App. 2011) (internal citations omitted).

In the case at hand, the State failed to prove that Bonnie Noe and B.H. were the same individual. In fact, the State made no attempt at all to prove to the jury that the two were the same individual. As such, Mr. Frauenberger asserts that they are not the same individuals. As a result, he asserts that the crimes for which he was charged, involving alleged victim Bonnie Noe, are not uniquely similarly to the evidence presented involving B.H. and therefore there is a danger that he could be later charged with crimes against B.H. As such, Mr. Frauenberger asserts that because the district court created a variance and thereby violated his right to due process, leaving him open to the risk of double jeopardy, and because he meets all three prongs of Idaho's fundamental error test, Mr. Frauenberger's conviction must be vacated.

IV.

The State Violated Mr. Frauenberger's Right To A Fair Trial By Committing Prosecutorial Misconduct

Because the State's argument concerning prosecutorial misconduct is not remarkable, no further reply is necessary. Accordingly, Mr. Frauenberger simply refers the Court back to pages 20-38 of his Appellant's Brief.

V.

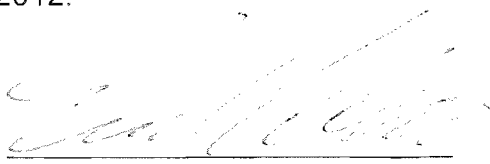
The District Court Abused Its Discretion When It Imposed, Upon Mr. Frauenberger,
Unified Sentences Of Ten Years, With Two Years Fixed, For The Lewd Conduct
Charges, And Four Years, With One Year Fixed, For The Delivery Of Marijuana Charge,
To Be Served Concurrently

Because the State's argument concerning the excessiveness of Mr. Frauenberger's sentence is not remarkable, no further reply is necessary. Accordingly, Mr. Frauenberger simply refers the Court back to pages 39-42 of his Appellant's Brief.

CONCLUSION

Mr. Frauenberger respectfully requests that this Court vacate his convictions and remand his case for further proceedings. Alternatively, he requests that this Court reduce his sentence as it deems appropriate.

DATED this 17th day of October, 2012.


ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of October, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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EAA/eas